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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1957.

No. 950

GOLDBLATT BROS., INC.,
An Illinois Corporation,

Petitioner,
(Defendant Appellant),

vs.

RICHARD KOSLEY,

Respondent,
(Plaintiff Appellee).

Brief In Opposition To Petition For Writ Of Certiorari.

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Brief In Opposition To Petition For Writ Of Certiorari.

Respondent respectfully submits that Petitioner has failed to advance any special and important reasons why this Court should grant the writ. In fact, Petitioner has failed to submit any reason for the granting of the writ as set forth in Rule 19 of the Court. The right of an employee to maintain a suit against his employer under Indiana law is a question of importance to the parties. It is not, however, the kind of question for which a writ of certiorari should be granted. The issue is determined on state law and the rulings below are in accordance with the applicable state decisions.

OPINIONS BELOW.

The opinion of the District Court (App. R. 32-35) is unreported. The opinion of the Court of Appeals, printed in the Appendix of Petitioner herein at page 13, is reported at 251 F. 2d 558.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 28, 1958 (Petitioner's App. p. 19). Rehearing was denied on February 20, 1958. (Petitioner's App. p. 20) The petition for writ of certiorari was filed on April 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

I.

Does Section 301 of the Labor Management Relation Act of 1947, 29 U.S.C. Section 185, and Section 3 of the United States Arbitration Act, 9 U.S.C. Section 3 apply in a diversity suit between an employee and employer for unpaid wages where there is no evidence of an industry affecting commerce being involved?

II.

Did the Federal District Court in the instant case, which was based upon diversity of citizenship, properly apply the Indiana law which states that arbitration agreements are revocable?

STATUTES INVOLVED.

The statutes cited by Petitioner are not applicable to the facts of the principal case as hereinafter shown. The only applicable statutes are Burns Indiana Statutes Annotated, 1952 Replacement Volume Sec. 40-101, 40-102 and Burns Indiana Statutes Annotated, 1946 Replacement Volume Sec. 3-222. They are printed in the appendix herein, infra page 1a.

STATEMENT.

Federal jurisdiction of Respondent's complaint against Petitioner is based upon diversity of citizenship and the requisite jurisdictional amount (Supp. R. p. 1a). The undisputed facts in the case at bar were that Respondent's complaint covered wages due him from Petitioner covering the period of July 1, 1947 to October 29, 1955 (App. R. 12). On October 9, 1956, Petitioner filed answer on the merits to Respondent's complaint and admitted the jurisdictional facts pleaded in the complaint (Supp. App. R. 4a).

Respondent notified Mr. Stevens, the business representative of the union, in 1945 and on several occasions after that of his wage demand, and was told to just keep going until it was straightened out (App. R. 13). Respondent notified Mr. Dall, the Petitioner's superintendent, in approximately 1949 or 1950, but no action was taken by Mr. Dall on Respondent's wage claim (App. R. 14).

On May 10, 1957, the petitioner, without notice to the Court or Respondent, (App. R. 15) appointed Mr. Stanford Clinton, the Petitioner's attorney of record in this case, as one of the arbitrators and, likewise without notice to the Court or Respondent, the union selected Frank Rebey (App. R. 6, 7). Respondent was given no opportunity or was he consulted on the appointment of these arbitrators (App. R. 14, 15). The Respondent first acquired notice through his attorney on or about May 21, 1957, that this matter was to be submitted to arbitration. The arbitrators and umpire had already been selected and the hearing was already scheduled for May 27, 1957 (App. R. 5, 6).

The International Union of Operating Engineers Local 846 did not consult Respondent, relative to the selection of the arbitrators (App. R. 15). Mr. Brookman, the president and business manager of the local union, testified that he was not familiar with the dispute between Respondent and Petitioner (App. R. 19, 20).

The union contract covers both the Hammond and Gary stores, and covers four employees (App. R. 24). Mr. Brookman did not notify Mr. Kosley when he learned of the proposed arbitration because Mr. Kosley is out of the union on a withdrawal card and the contract is between the union and Goldblatt Bros., Inc. and he thinks that the union should protect itself (App. R. 25). The union did not start the arbitration (App. R. 28).

ARGUMENT.

The judgment of the Circuit Court of Appeals is correct and is not in conflict with any applicable decision.

I.

Sections 1, 2 and 3 of The United States Arbitration Act, 9 U.S.C. Sections 1, 2 and 3 are not applicable to the present case. Section 1 of the act specifically excludes "contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce" and this Court has interpreted the Section as follows:

"Since Section 3 is a part of the regulatory scheme, we can only assume that the 'agreement in writing' for arbitration referred to in Section 3 is the kind of agreement which Sections 1 and 2 have brought under federal regulation. There is no intimation or suggestion in the Committee Reports that Sections 1 and 2 cover a narrower field than Section 3. * * * We conclude that the stay provided in Section 3 reaches only those contracts covered by Sections 1 and 2." *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 201, 202, (1956).

It might be further pointed out that there is no evidence in the record that the Petitioner is engaged in commerce or that the contract in question involves "a transaction involving commerce". Therefore, Section 2 of the United States Arbitration Act, 9 U.S.C. Section 2, does not apply to the case at bar. The United States Arbitration Act is specifically limited by Section 2 to "any maritime transaction or a contract evidencing a transaction involving commerce", and, therefore, it is readily appar-

ent that Sections 1, 2 and 3 of the United States Arbitration Act have no application to the present case.

Even if the transaction involved commerce, then Section 1 specifically excludes the case at bar as it is provided "nothing herein contained shall apply to contracts of employment of * * * any other class of workers engaged in foreign or interstate commerce."

It is also to be noted that Section 3 of the United States Arbitration Act, 9 U.S.C. Section 2 provides for a stay, "provided the applicant for the stay is not in default in proceeding with such arbitration." The Petitioner was in default in the proceeding for such arbitration by virtue of its filing answer on the merits of the case without raising any question of arbitration, and further by virtue of its inaction for a period of several years after notice of Respondent's claim and for a period of some seven months after filing answer before a request was made for arbitration.

II.

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185 is inapplicable to the present case because Respondent has not sued under Section 301. The complaint of Respondent for unpaid wages in the present case was based upon diversity of citizenship and the statutory amount of damages. There is nothing in the record to indicate that "industry affecting commerce" is involved as required by Section 301. Further Section 301 applies only to suits "between an employer and a *labor organization.*" In the case of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955) this Court held that a suit for unpaid wages by a union on behalf of certain employees was not a proper subject matter of a suit that could be brought under Section 301.

III.

The Federal Courts in a diversity case must look to state law to determine whether an arbitration provision will be enforceable. *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 205, (1956).

The Petitioner waived its right to enforce the arbitration clause when the Petitioner and the union stood by for over seven years after notice of Respondent's claim (App. R. 13, 14). Further, it filed answer to Respondent's complaint and failed to take any action whatsoever on the arbitration until some seven months after answer was filed and thereby waived arbitration. *La Nacional Platanera SCL* v. *North American Fruit and Steamship Corp.*, (CCA Ala.) 84 Fed. 2d 881, 883, (1936); *American Locomotive Company* v. *Chemical Research Corp.*, (CCA Mich.) 171 Fed. 2d 115, 121 (1948); *Radiator Specialty Co.* v. *Cannon Mills, Inc.*, (CCA N.C.) 97 Fed. 2d 318, 319 (1938).

The arbitration clause in the present case provided, "It is agreed that there shall be no strikes, lockouts, stoppages, or the use of any economic coercion during the term of this agreement." Certainly it is apparent, where the above phrase appears in the first sentence of the arbitration clause, that the matters contemplated by the party to be subject to arbitration are "union matters" involving strikes, lockouts, stoppages, or the use of economic coercion during the term of this agreement, or as characterized by the union president, it is the "no strike clause", (App. R. 21) and would not cover a claim by an individual employee for past due wages.

"The employees have always been able to enforce their individual rights in state courts." *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955).

In Indiana, the individual has a statutory right to be paid by his employer and any contract to the contrary is void. The Indiana Statute further provides liquidated damages and attorney fees and expressly recognizes the right of an employee to bring a court action for the wages. (Burns Indiana Statutes Annotated, Section 40-101 and 40-102; App. at p. 1a)

Certainly the statutes recognize the policy within the State of Indiana of giving to every employee a distinct right to collect his own wages in the courts, regardless of what the collective bargaining agreement might provide.

The arbitration agreement was revocable under state law. It is well settled that in a diversity case the revocability of the arbitration agreement is to be determined by state law.

"• • • the federal court enforcing a state-created right in a diversity case is, • • • only another court of the State." *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 203 (1956).

"If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in the ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1 Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need give their reasons for their results; the record of their proceedings is not as complete as it is in

a court trial; and judicial review of an award is more limited than judicial review of a trial." The court further stated at page 204; "There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be." *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 203 (1956).

Generally the institution of a suit covering the same subject matter as that submitted to arbitration revokes the submission. 6 C.J.S. Arbitration and Award, Section 34 (e) and cases cited therein.

A common-law submission may be revoked at any time before the award is made, even though the agreement provides that the submission cannot be revoked. *Heritage* v. *State, ex rel Crim Auditor, et al*, 43 Ind. App. 595, p. 600, 88 N.E. 114 (1909); *Grand Rapids and Indiana Railway Company* v. *Jaqua*, 66 Ind. App. 113, 115 N.E. 73 (1917).

The attempted arbitration in the present case was not in compliance with the Indiana Statute, which provides as follows:

"If the subject-matter of any suit pending in any court might originally have been submitted to arbitration, the parties to such suit, their agent or attorney-at-law, may consent, by rule of court, to refer the matter in controversy to certain persons mutually chosen by them in open court." Burns Indiana Statutes Annotated (1946 Replacement Volume) Section 3-222.

Therefore, in the case at bar immediately upon filing the Respondent's complaint herein, the arbitration agreement, if we assume it covered the subject matter in dispute, was revoked. Further, Respondent expressly revoked any arbitration agreements at the hearing on his petition for restraining order. (App. R. 14)

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

GEORGE KOHL,
Of Counsel.
May 22, 1958.

APPENDIX.

1. Statutory Provisions Cited and Quoted.

BURNS INDIANA STATUTES ANNOTATED (1952 Replacement Volume) Section 40-101, Acts 1933, Chapter 47, Section 1, p. 371 recognizes the individual right of an employee to be paid by his employer and states that "any contract to the contrary shall be void."

BURNS INDIANA STATUTES ANNOTATED (1952 Replacement Volume) Section 40-102, Acts 1933, Chapter 47, Section 2, p. 371 further provides for liquidated damages and attorney fees in the event that such payment is not made and states: " • • • *and said damages may be recovered in any court* having jurisdiction of a suit to recover the amount due to such employee." (our emphasis)

BURNS INDIANA STATUTES ANNOTATED (1946 Replacement Volume) Section 3-222, 2 R.S. 1852, Chapter 3, Section 22, p. 227 states: "If the subject-matter of any suit pending in any court might originally have been submitted to arbitration, the parties to such suit, their agent or attorney-at-law, may consent, by rule of court, to refer the matter in controversy to certain persons mutually chosen by them in open court."